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No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ORIGINAL

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mark E. Olive
Donald R. Lee, Jr.
Virginia Capital Representation Resource Center
1001 East Main Street
Richmond, VA 23219
(804) 643-6845

Paul G. Turner
Counsel of Record
3110 Sunset Avenue
Richmond, VA 23221
(804) 353-7443

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(4)

CAPITAL CASE: Execution Date Scheduled December 14, 1995

QUESTIONS PRESENTED

1. Whether the "new rule" doctrine bars federal habeas corpus relief where a federal district court vacates a death sentence by applying fundamental principles of due process recognized by this Court in Gardner v. Florida, 430 U.S. 349 (1977), and prior decisions to conclude that the petitioner's death sentence was unreliable and obtained unconstitutionally through the prosecutor's tactics of ambush and failure to disclose material exculpatory evidence?

2. When in order to prove that the defendant poses a danger in the future the state introduces evidence at capital sentencing purportedly connecting the defendant to a notorious double homicide, is the prosecutor required, under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including Kyles v. Whitley, 115 S. Ct. 1555 (1995), to disclose evidence tending to prove that another person actually committed the double homicide?

3. Whether the limiting instructions given by the trial judge to the jury were sufficient to cure the facially unconstitutional "vileness" aggravating circumstance submitted to the jury as a basis upon which it could sentence the petitioner to death?

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COLEMAN WAYNE GRAY,

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PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Coleman Wayne Gray, a Virginia inmate under sentence of death, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing a writ of habeas corpus granted him by the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in Gray v. Thompson, 58 F.3d 59 (4th Cir. 1995) and appears in Appendix A to this Petition. The opinion of the District Court for the Eastern District of Virginia is unreported, and it appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals opinion in this matter was filed on June 28, 1995. A timely Petition for Rehearing was filed on July 12, 1995. The Court of Appeals' denial of the Petition for Rehearing was issued on July 25, 1995 and is set forth in Appendix C. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments VIII and XIV to the United States Constitution, and Virginia Code § 19.2-264.2, are set forth in Appendix D.

STATEMENT OF THE CASE

Coleman Wayne Gray was convicted of capital murder and sentenced to death by the Circuit Court of the City of Suffolk, Virginia in 1985. The United States District Court for the Eastern District of Virginia granted its writ of habeas corpus and vacated Gray's death sentence because it found that the prosecutor ambushed Gray by introducing at the sentencing phase of his trial unreliable evidence suggesting that Gray had committed a highly-publicized double homicide for which he never has been indicted or convicted, employing "tactics violat[ing] the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." The United States Court of Appeals for the Fourth Circuit reversed the District Court without reaching the merits of Gray's claim, instead holding that Gray impermissibly sought the benefit of a new rule of criminal procedure on collateral review. Gray seeks review in this Court of that holding and other holdings of the Fourth Circuit.

A) The Guilt Phase Of Gray's Trial

Melvin Tucker and Coleman Gray were arrested and indicted for the capital murder of Richard McClelland. On May 2, 1985, Mr. McClelland, the manager of a Murphy's Mart store in Portsmouth, Virginia, was abducted from his car after leaving work, robbed, and shot to death in the City of Suffolk.

Virginia. Judge Godwin, the Suffolk Senior Circuit Court Judge, appointed Mr. James Moore and Mr. Ward Eason to represent Gray.

Mr. Moore and Mr. Eason were appointed in May, 1985. (A. 978-9).[1] On June 27, 1985 and on November 7, 1985, trial counsel moved the trial court either to pay for or to appoint an investigator to help them fully and adequately prepare Gray's defense. (A. 798-800, 1063-8). Those motions were denied. Id.

In November, 1985, trial counsel filed a pre-trial discovery motion, seeking the disclosure of all exculpatory evidence. (A. 790-92). Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murder. (A. 937). The Commonwealth's Attorney disclosed no evidence concerning the penalty phase of the trial.

Under Virginia law, only the triggerman may be convicted of capital murder and sentenced to death. Va. Code § 18.2-18. Consequently, the most critical factual issue in the McClelland murder trial probably was the identity of the triggerman. There was no physical evidence to prove whether Tucker or Gray shot and killed Mr. McClelland, and each man claimed that the other had committed the murder. (A. 937).

Before Gray's trial, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. In exchange for Tucker's testimony against Gray, the Commonwealth agreed to try Gray on a capital murder charge, and to prosecute Tucker only for first degree murder. (A. 937-8). Gray's capital murder trial began on December 2, 1985. This was Commonwealth's Attorney Ferguson's first capital murder trial. (A. 938). At the beginning of the trial, one of Gray's attorneys asked the trial court to order the Commonwealth's Attorney to reveal the evidence he would introduce at the penalty phase if

[1]Record citations refer to the Joint Appendix that the parties filed in the United States Court of Appeals for the Fourth Circuit. Pursuant to Supreme Court Rule 14.1(i), specified record references are included as Appendix E to this Petition.

Gray was found guilty. Counsel based this request on a Virginia Supreme Court case which established that the fair and preferred practice in capital murder trials is for the prosecution to reveal the evidence to be presented at the penalty phase prior to the trial. See Peterson v. Commonwealth, 225 Va. 289, 297, 302 S.E.2d 520, 526, cert. denied, 464 U.S. 865 (1983).

Ferguson represented to the court and to defense counsel that he intended to introduce evidence of statements Gray allegedly had made about other crimes he had committed. The following conversation occurred:

> Mr. Moore: Your honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument ... If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal purposes. It's absolute dynamite.
>
> Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record ... **The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.** ...
>
> Mr. Moore: **Is it going to be evidence or just his statement?**
>
> Mr. Ferguson: **Statements that your client made.**
>
> Mr. Moore: **Nothing other than statements?**
>
> Mr. Ferguson: **To other people, that's correct. Statements made by your client that he did these things.**

(A. 938-9). Ferguson did not disclose the context of the statements or to whom Gray allegedly had made these statements.

The Sorrell murders were one of the most notorious crimes in the history of the Tidewater,

Virginia area. In December, 1984, Lisa Sorrell and her three-year-old daughter Shanta were abducted from Greenbriar Mall in Chesapeake, Virginia. Five days later, after an intensive, well-publicized search, their abandoned bodies were found. Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. She had been shot in the head six times by a .32 caliber gun. Shanta's body was found in the trunk of her mother's car. She apparently had died of carbon monoxide inhalation. (A. 939-40).

Melvin Tucker, who had a previous conviction for armed robbery, testified at trial on behalf of the Commonwealth pursuant to his plea agreement. Under the terms of this agreement, the Commonwealth agreed to try him "on a charge of first degree murder rather than capital murder," and "to convey to the Court [trying him on first degree murder charges] the nature and extent of [his] cooperation at the time of his sentencing." (A. 1684-87).

Tucker had given multiple statements to the police concerning the crime. In these statements, Tucker's story varied, except he always maintained that Gray was the triggerman. At trial, Tucker testified that Gray led in the planning of the robbery of the Murphy's Mart and the subsequent abduction of McClelland, that he (Tucker) never touched the murder weapon, and that Gray had possession of the gun during the entire time of the crimes. Tucker testified further that Gray was the "triggerman," and that Gray had burned McClelland's vehicle afterward. (A. 1688-1718). Tucker also testified that, sometime after the murder, he took Gray to the Nansemond Treatment Plant, where Tucker was employed. According to Tucker, Gray threw the murder weapon into one of the contact tanks at the treatment plant. (A. 1729-31).

In addition to Tucker's testimony, the Commonwealth relied upon three jailhouse snitches who testified that Gray had confessed to killing Mr. McClelland. Inmate Sylvester "Jake" Joyner testified that Gray admitted to binding, gagging, and shooting Mr. McClelland. Inmate Jeremiah Smallwood testified that Gray confessed to binding Mr. McClelland's hands and shooting him. Mr. McClelland had not been

bound and gagged, but television and newspaper accounts reported that he was. (A. 1289-91, 1803-4, 1925-28). Larabee Ferrell, another inmate at Chesapeake City Jail, testified that he heard Gray admit to inmate Carl Bond that he was the "triggerman" in the McClelland murder. (A. 1908-14). Bond, a former deputy sheriff, testified at trial that he was incarcerated in the Chesapeake City Jail at the same time as Gray, but that Gray always maintained that Tucker was the "triggerman" in the McClelland murder. (A. 1971). Although the Commonwealth was aware that Bond's testimony contradicted Ferrell, it never informed Gray's counsel of this exculpatory evidence. (A. 1978-81). The Commonwealth presented no other evidence to prove that Gray was the "triggerman." It relied completely upon the testimony of Tucker, Joyner, Smallwood, and Ferrell to prove this essential element.

On December 5, 1985, Gray's jury retired to deliberate, after receiving all of the evidence concerning the McClelland murder, and after being instructed by the trial judge. That same day, the jury returned verdicts of guilty against Gray on all counts. Gray's punishments on the robbery charge and the abduction charge were set at life imprisonment. His punishment on the arson charge was ten years, and he was given four years on each of the firearm charges. (A. 940).

B) The Penalty Phase

The next morning, the penalty phase of Gray's capital murder trial began. Before trial, the attorneys met in the trial judge's chambers. Gray's counsel told the court that the previous evening, Ferguson had disclosed for the first time that he intended to introduce not only statements Gray allegedly had made about the Sorrell murders, but also graphic testimonial and photographic evidence about the crimes. Despite Ferguson's previous unequivocal pledge to introduce only statements, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) testimony of Detective Michael Slezak, the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims; and 3) testimony of the medical examiner who investigated the causes of death and the nature and extent of the Sorrells'

injuries. (A. 940-1).

Gray's trial counsel told the court that they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut the statements allegedly made by Gray to fellow inmates. Despite counsel's plea for additional time to prepare, the trial court permitted Ferguson to introduce extensive evidence about the Sorrell murders. First, the Commonwealth called Gray's accomplice Melvin Tucker to testify. Tucker had escaped prosecution for capital murder in the McClelland matter in exchange for his testimony against Gray. Tucker testified that, in May 1985, while he and Gray were looking for newspaper articles about the McClelland murder, Gray allegedly pointed to an article with the picture of the Sorrells. Gray then allegedly admitted that he had "knocked off" Lisa Sorrell.[2] (A. 941).

Based solely upon Tucker's testimony, the trial court allowed Commonwealth's Attorney Ferguson to introduce all of the evidence gathered by the Chesapeake Police Department regarding the Sorrell murders. First, the Commonwealth called Detective Slezak, the Chesapeake police officer who investigated the Sorrell murders. The ostensible purpose of Slezak's testimony was to demonstrate that the Sorrell murders actually had occurred, and he did this by identifying various graphic photographs of the burned automobile and the murder victims. These photographs were admitted into evidence. (A. 941).

Next, Dr. Faruk Presswalla, the state medical examiner who performed the Sorrell autopsies, testified concerning the victims' causes of death. Presswalla displayed the autopsy photos of Lisa and Shanta Sorrell to the jury, and he described the violent causes of their deaths. (A. 2136-44).

As they had predicted to the trial court, Gray's trial attorneys were unable to effectively cross-examine these witnesses. Trial counsel were prepared only to challenge the evidence Ferguson indicated

[2]The Sorrell murders had occurred on December 4, 1984, nearly six months before the McClelland murder. No such newspaper article, from the time of the McClelland crime, with pictures of the Sorrells, has ever been introduced into evidence. (A. 941).

he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the Sorrell murders. (A. 944).

After the Commonwealth rested, Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, Gray denied being the triggerman, and he blamed the killing on Tucker. He also flatly denied any involvement in the Sorrell murders. Gray also called seven witnesses who presented mitigating testimony in his behalf. (A. 944).

During penalty phase closing arguments, Ferguson used the Sorrell evidence extensively in his efforts to convince the jury to sentence Gray to death as a future danger to society. He reviewed at length the testimony of Detective Slezak and the medical examiner, describing again for the jury the crime scene and the causes of death of the Sorrells, and he argued that these murders plainly demonstrated that Gray posed a future danger to society. (A. 2243-5, 2250-2).

During rebuttal argument, Ferguson asked the jury:

> [D]id he sit in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?
>
> Nobody put the gun in his hand but himself. He chose to use it in each of these cases, and when he does, then he must pay the penalty for it.

(A. 2263).

Gray's jury was instructed to consider whether the Commonwealth had proven either or both of the "future dangerousness" and "vileness" aggravators. The jury received no instruction concerning the way in which it should consider the Sorrell evidence. Concerning their duty to determine whether the Commonwealth had proven beyond a reasonable doubt that the murder was "outrageously or wantonly vile, horrible, or inhumane [sic] in that it involved torture, depravity of mind or aggravated battery to the victim," the jury received the following additional instructions based upon the Virginia Supreme Court's decision in Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied 441 U.S. 967 (1979):

> Depravity of mind is a degree of moral turpitude and physical [sic] debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.
>
> Aggravated battery is a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder.

(A. 2233-5). By using the word physical instead of psychical, the trial court misstated the Smith standard. The trial court did not define torture, moral turpitude, psychical, debasement, ordinary legal malice, or premeditation.

After deliberating for one hour and ten minutes, the jury unanimously fixed Gray's punishment at death. The jury found both that Gray posed a future danger to society, and that his conduct in committing the offense was vile "in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." (A. 2265-8).

C) The Federal Evidentiary Hearing

On April 21, 1994, the United States District Court for the Eastern District of Virginia, Richmond Division, convened an evidentiary hearing in connection with Gray's federal habeas corpus petition filed under 28 U.S.C. § 2254. In this petition, Gray had raised a claim asserting that the Commonwealth's use of the Sorrell evidence violated his due process rights. The stated purpose of the evidentiary hearing was to determine whether Gray's attorneys were given ample notice of the evidence to be presented against him concerning the Sorrell murders, whether they were given a fair opportunity for cross-examination concerning the Sorrell murder issues, and whether the prosecution failed to turn over exculpatory information tending to prove that another person killed Lisa and Shanta Sorrell. (A. 265).

The District Court made the following findings of fact. Detective Slezak knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. (A. 940). Detective Slezak failed to tell the jury that Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a long period of time. At the evidentiary hearing in the District Court,

Slezak testified that Timothy Sorrell admitted being at the Greenbriar Mall on the evening of the murders, ignored Lisa Sorrell's parents when they saw him at the mall, made suspicious comments after he was notified that his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. Timothy Sorrell also visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. During their investigation, the police designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed. (A. 942).

Slezak's investigation revealed Timothy Sorrell's motive to murder his wife and child. Two weeks prior to the crime, a life insurance policy had been issued for the Sorrells. Timothy and Shanta were named as Lisa Sorrell's beneficiaries. Six days before Coleman Gray's trial began, Lisa Sorrell's parents, the Nixons, filed a pleading in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. (A. 942). This pleading asserted that Sorrell currently was under police investigation for the murders, and that it was anticipated that he soon would be indicted. (A. 719).

The District Court received testimony from Alfred Brown, a private investigator hired by Gray. The Nixons told Brown that one week prior to their daughter Lisa's death, a man possessing stolen merchandise came to the Sorrells' home. The Nixons and Detective Slezak suspected that Lisa was very upset about her husband's apparent involvement in a major criminal theft ring at the naval exchange where he was employed. Based upon all this information, Detective Slezak consulted Robert Kowalsky, the Chesapeake Commonwealth's Attorney, and asked him to determine whether Timothy Sorrell should be prosecuted for the murders of his wife and child. (A. 542-3, 942-3).

In July of 1985, Detective Slezak interviewed Coleman Gray. Slezak lied to Gray, and told him that Timothy Sorrell was going to be tried for the murder of his wife and daughter. Slezak asked for Gray's assistance. He told Gray there was evidence that would implicate Gray in the murder, and he

needed Gray to provide an explanation. Gray denied any involvement. Without being under any compulsion to cooperate, he agreed to provide fingerprint samples. (A. 944). Slezak then lied to Gray again. He told him that one of Gray's fingerprints matched a fingerprint found at the Sorrell murder scene. Gray's insistence that he did not commit the crime did not waver. Id.

Commonwealth's Attorney Ferguson never disclosed any of this information to defense counsel, even though it tended to prove that Gray was not involved in the Sorrell murders. In fact, during the federal evidentiary hearing Ferguson testified that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." The District Court later found that this "assertion is patently absurd." (A. 943).

Indeed, during the federal evidentiary hearing the Commonwealth intended to "establish[] that Mr. Gray did in fact commit the Sorrell murders," even though the District Court already had explained that the fact of Gray's guilt or innocence was not relevant to a determination whether his due process rights had been violated. (A. 268). The Commonwealth's evidence consisted almost exclusively of Detective Slezak's testimony concerning an attempt to verify his theory that Coleman Gray and his wife Melinda Gray committed the Sorrell murders during her dinner break.

On that day, Ms. Gray had a dinner break from her job at Murphy's Mart from 4:29 to 5:30 p.m. To investigate whether Gray could pick up his wife, drive to the Greenbriar Mall, abduct and kill the Sorrells, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the mall and Murphy's Mart. At 3:00 p.m., it took him about twenty-three minutes to travel one way between the locations. Detective Slezak did not drive the routes between the mall and scene of the crime or between the scene of the crime and Murphy's Mart. (A. 943).

Investigator Brown testified that he drove the same route driven by Detective Slezak, but he did it between the rush hours of 4:00 p.m. and 6:00 p.m., approximating the time the murders were committed. It took Brown over forty-three minutes to drive this leg. It took him another twenty-five

minutes to drive from Greenbriar Mall to the place where the bodies were discovered, and another fifteen minutes to drive from that scene to Murphy's Mart. His round trip took one hour and twenty-three minutes. The testimonies of Detective Slezak and Investigator Brown led the federal district court to conclude that "it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated." (A. 943).

To date, no one ever has been charged with or tried for the Sorrell murders.

D) The District Court's Opinion

At the conclusion of the evidentiary hearing, the District Court took this matter under advisement. On August 25, 1994, the Court filed an opinion and order issuing its writ of habeas corpus and vacating Gray's death sentence. The District Court made findings of fact that there was an abundance of evidence demonstrating that Gray was not involved in the Sorrell murders, and found that the prosecutor's testimony that, to his knowledge, there was then and is now no evidence that anyone but Gray committed the Sorrell murders to be "patently absurd." (A. 943).

The District Court grounded its decision to grant relief squarely upon fundamental principles of:

> due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase. [The prosecutor's] decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

(A. 945-6).

Specifically, the District Court based its holding upon the fact that the Due Process Clause does not allow the execution of a person on the basis of information which he has had no opportunity to explain or deny. The District Court reached this conclusion based upon this Court's holdings in Simmons v. South Carolina, 114 S. Ct. 2187, 2192 (1994), Gardner v. Florida, 430 U.S. 349, 362 (1977), In re Oliver, 333 U.S. 257, 273 (1948), and Baldwin v. Hale, 68 U.S. 223, 233 (1863). The District Court

explained further that the essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing, and that when a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. (A. 946-7).

Based upon these basic principles of due process of law, the District Court concluded that the constitutional defect in Gray's penalty phase hearing -- that he was confronted and surprised by the evidence presented by the prosecutor after a promise not to present this kind of evidence -- violated Gray's right to fair notice and rendered the hearing clearly unreliable:

> The consequences of this surprise could not have been more devastating. ... [T]he Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries-no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed on Gray cannot stand.

(A. 948-9).

The District Court also held that, in addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed Gray's right to be sentenced based upon constitutionally reliable evidence. The District Court based this ruling upon this Court's decisions in United States v. Tucker, 404 U.S. 443, 447 (1972) and Townsend v. Burke, 334 U.S. 736, 741 (1948), and upon the Eleventh Circuit's decision in Richardson v. Johnson, 864 F.2d 1536 (11th Cir.) cert. denied, 490 U.S. 1114 (1989). Again, the District Court also relied upon this Court's opinion in Gardner, because the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or the materiality of the information necessarily reduced the reliability of the evidence presented. (A. 949).

> Specifically, with respect to the reliability of the evidence, the District Court explained that:
>
> The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. ... Because neither the defense attorneys, the Court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

(A. 949-50). For all of these reasons, the Court found that the prosecutor's tactics violated the moral standards of fair play embodied in the Due Process Clause, and it vacated Gray's death sentence.

E) The Court Of Appeals' Opinion

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the District Court's decision to vacate Gray's death sentence, and affirmed its decision to dismiss Gray's challenge to Virginia's vileness aggravator. With respect to the due process claim, the Court of Appeals did not reach the merits, but instead held that consideration of Gray's claim was barred by this Court's "new rule" doctrine. First, the Court of Appeals defined "the precise rule petitioner seeks [as] a constitutional entitlement to adequate advance notice of particular items of evidence." Gray v. Thompson, 58 F.3d 59, 64 (4th Cir. 1995). This rule neither was advanced by Gray nor established by the District Court's decision. The Court of Appeals then concluded that this specific rule is not dictated by this Court's decision in Gardner. In a concurring opinion, one member of the Court of Appeals panel expressed concern that the majority "has very likely fallen into the trap" of defining the rule for retroactivity analysis as the most specific conclusion or holding the petitioner hopes to be reached. Id. at 68. This panel member believed it to be at least arguable that, were the court to grant the relief requested, the rule to emerge would have been dictated by Gardner. Id. at 67.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT CREATED A NEW RULE WHEN IT APPLIED GARDNER'S GENERAL PRINCIPLES OF DUE PROCESS TO CONCLUDE THAT PETITIONER'S DEATH SENTENCE WAS OBTAINED UNCONSTITUTIONALLY THROUGH PROSECUTORIAL TACTICS OF AMBUSH AND FAILURE TO DISCLOSE EXCULPATORY EVIDENCE CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT, OTHER FOURTH CIRCUIT DECISIONS, AND DECISIONS OF THE FIFTH AND NINTH CIRCUITS.

Certiorari on this question should be granted because the Opinion below conflicts with previous opinions of this Court, other Fourth Circuit decisions, and decisions of the United States Court of Appeals for the Fifth and Ninth Circuits.

A. A Federal Court Generally Does Not Create A New Rule When It Applies General Rules Which Of Necessity Require A Case-By-Case Examination Of The Evidence.

In Teague v. Lane, 489 U.S. 288 (1989), a plurality of this Court adopted the second Justice Harlan's retroactivity approach and held that a "new rule" of federal constitutional law will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions.[3] See generally Teague, 489 U.S. at 299-316 (plurality opinion). The new rule doctrine is predicated on interests of comity and the finality of criminal convictions. Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993). This principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 497 U.S. 227, 231 (1990).

This Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989) demonstrates the critical distinction between the extension of existing precedent on collateral review to announce a new rule, and the mere application of an existing general principle to a new set of facts. Penry claimed he "was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence." Id. at 307. On collateral review, the Fifth Circuit had rejected Penry's claim because his jury was allowed to hear all mitigating evidence, which concerned his mental retardation and his abused childhood. See Penry v. Lynaugh, 832 F.2d 915, 920 (5th Cir. 1987). The Fifth Circuit nevertheless was concerned that, under the Texas scheme, Penry's jury was not able to consider and give effect to his mitigating evidence. See generally id. at 920-26. The Fifth Circuit concluded that it could not rule in Penry's favor "because prior Fifth Circuit decisions have rejected claims similar to Penry's. These prior panel holdings bar a different

[3]The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe." Teague, 489 U.S. at 311 (plurality opinion) (internal quotation marks omitted). The second exception is for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990).

holding by us." Id. at 926. Thus, granting Penry the relief he sought would have required the Fifth Circuit to overrule these precedents. This Court granted certiorari.

The Court first addressed whether Penry's claim was barred under Teague. See generally Penry, 492 U.S. at 313-19. Despite the fact that granting Penry the relief he sought would have required the repudiation of prior Fifth Circuit decisions, this Court held that Penry's claim was not barred by Teague because he did not seek a new rule. Rather, he simply sought the application, and not the extension, of a pre-existing rule of law in a new factual setting. Id. at 314-15. The Court explained that:

> [T]he facial validity of the Texas death penalty statute had been upheld in [Jurek v. Texas, 428 U.S. 262 (1976)] on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present. Penry argues that those assurances were not fulfilled in his particular case because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision ... [I]n light of the assurances upon which Jurek was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the state of Texas.

492 U.S. at 318-19 (emphasis in original) (quoting Teague, 489 U.S. at 301) (plurality opinion).

The Jurek rule created a standard which the Court simply applied to the facts of Penry's case. Despite the fact that the specific holding announced in Penry was novel and repudiated prior Fifth Circuit decisions, Penry's claim was not barred by the "new rule" doctrine because it did not impose a new obligation on the state; the state already was obligated to apply the Jurek standard.

Oddly, in prior decisions the Fourth Circuit endorsed the foregoing analysis of the "new rule" doctrine. In Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), cert. denied, 115 S. Ct. 1359 (1995), the Fourth Circuit concluded that the petitioner did not seek a new rule when he relied upon this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) to challenge whether Virginia's facially vague vileness factor was constitutionally applied in his case. After its lengthy analysis of this Court's "new rule" jurisprudence, the Circuit Court held that:

> [W]hen a rule provides a standard that of necessity requires a case-by-case examination, generally the results yielded by that application are not "new rules" because those results do not "break[ ] new ground or impose[ ] a new obligation on the States or the Federal Government." Teague.

> 489 U.S. at 301 (plurality opinion); cf. Penry, 492 U.S. at 315-319 (emphasizing that the application of the pre-existing rule at issue did not impose a new obligation on the state).

35 F.3d at 886.

Similarly, in Ostrander v. Green, 46 F.3d 347 (1995), the Fourth Circuit rejected the Commonwealth of Virginia's argument that a holding in the petitioner's favor on his ineffective assistance of counsel claim would constitute a "new rule." The Fourth Circuit relied upon its own holding in Turner and Justices Kennedy's and O'Connor's concurring opinions in Wright v. West, 112 S. Ct. 2482 (1992), in reaching this conclusion:

> A "rule" is a principle of law we apply to the factual situations -- be they few or many -- within the rule's intended ambit. Though cases are the hardware out of which we fashion rules, rules are more than just cases. Sometimes courts fashion broad rules intended to govern an array of factual settings; often they frame more narrowly. When we ask whether a proffered holding would be a "new rule," we must therefore bear in mind the level of generality at which the prevailing rule or rules are meant to be applied. Turner, 35 F.3d at 883. Just as habeas petitioners could always avoid the Teague bar if we define "rules" at an abstractly broad level of generality (e.g. "due process"), so also could respondents erect the bar in almost every case if we characterize a "rule" as "the most specific conclusion or holding [the petitioner] hopes we reach[.]" Id. (emphasis in original deleted). History does repeat itself, but not frequently or comprehensively enough to provide a case law exemplar for every set of facts.
>
> Here we apply [the ineffective assistance of counsel test of Hill v. Lockhart, 474 U.S. 52 (1985),] "a rule designed for the specific purpose of evaluating a myriad of factual contexts, [so] it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." Wright v. West, 112 S. Ct. 2482, 2499 (Kennedy, J., concurring in the judgment); see also id. at 2497 (O'Connor, J., concurring in the judgment). Though Justice Kennedy's remark concerned the Jackson v. Virginia standard for evaluating the constitutional sufficiency of evidence of guilt, it is equally applicable to the Hill-Strickland ineffective assistance tests. Indeed, the all but limitless number of evidentiary situations to which Jackson could apply may be approached only by the regrettably vast quantity of ways lawyers can discover to render incompetent assistance. Only a broad 'normative" rule can assure any degree of fairness and consistency in evaluating ineffective assistance claims. An existing normative rule applied to a novel set of facts becomes "new" only if the rule's boundaries are extended, and not merely because its interstices are filled.

46 F.3d at 354.

The Fourth Circuit's decision in this case stands in stark contrast to its decisions in Turner and Ostrander. The Circuit Court simply concluded, contrary to the jurisprudence of this Court, that Gray sought a narrow new constitutional rule entitling him to adequate advance notice of particular items of

evidence, and then held that this narrow and specific rule is not dictated by this Court's decision in Gardner v. Florida. This rule, however, neither was advocated by Gray nor was created by the District Court's decision. The District Court imposed no new obligation on the Commonwealth of Virginia -- it already was bound to honor the Gardner principles in capital sentencing, and the District Court simply applied those principles to the facts of Gray's case. See Penry, 492 U.S. at 318-19. An examination of the Gardner decision and the decisions of this Court upon which it is founded demonstrates that the Fourth Circuit's "new rule" analysis in this case is fundamentally flawed.

B. A Federal Court Generally Does Not Create A "New Rule" Simply By Applying To A New Set Of Facts The General Due Process Principles Relied Upon By This Court To Reach Its Holding in *Gardner v. Florida*.

In its memorandum opinion granting relief, the District Court concluded that Gray's right to due process was violated by the manner in which the Commonwealth presented evidence of the Sorrell murders to the jury. The District Court relied substantially, but not exclusively, upon this Court's holding in Gardner v. Florida, 430 U.S. 349 (1977) to reach this holding. Specifically, the District Court relied upon two intersecting principles of due process applied in Gardner. First, a capital defendant may not constitutionally be sentenced to death based in part upon evidence which he has had no opportunity to explain or deny. 430 U.S. at 362. Second, counsel for a capital defendant must be given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. Id. at 356. Without these safeguards, a state creates the risk that a person will be sentenced to death based on constitutionally unreliable evidence. Id. at 359.

In Gardner, a Florida trial judge sentenced a capital defendant to death, relying in part upon a confidential portion of a pre-sentence investigational report that was not disclosed to or requested by defense counsel. 430 U.S. at 353. The trial judge did not comment on the contents of the confidential portion in reaching his decision, and his findings did not indicate that there was anything of special importance in the undisclosed portion, or that there was any reason other than customary practice for not

disclosing the confidential portion to the parties. Id.

Gardner argued that the trial court violated his right to be sentenced in accordance with due process by considering the confidential portion of the pre-sentence report without disclosing it to defense counsel. The State of Florida placed its primary reliance on this Court's landmark decision in Williams v. New York, 337 U.S. 241 (1949). In that case, as in Gardner, the trial judge rejected the jury's recommendation of mercy and imposed the death sentence in reliance, at least in part, on material contained in a report prepared by the court's probation department. The New York Court of Appeals had affirmed the sentence, rejecting the contention that it was a denial of due process to rely on information supplied by witnesses whom the accused could neither confront nor cross-examine. This Court affirmed the decision of the New York Court of Appeals.

In Gardner, this Court rejected Florida's reliance upon Williams, explaining that:

> In 1949, when the Williams case was decided, no significant constitutional difference between the death sentence and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was convicted of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.
>
> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of a criminal proceeding at which he is entitled to the effective assistance of counsel. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

430 U.S. at 357-59 (emphasis added and citations omitted).

After rejecting Florida's asserted justification for a capital sentencing procedure which permits a trial judge to impose the death sentence on the basis of confidential information not disclosed to the defendant or his counsel, this Court held simply "that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to explain or deny." 430 U.S. at 362. The Court explained that if the confidential information had been fully disclosed and defense counsel had been given the opportunity to challenge the accuracy or materiality of the information, the trial judge may have decided not to impose death. Therefore, this Court vacated Gardner's sentence, and remanded the case to the Florida Supreme Court with directions to order further proceedings in the trial court not inconsistent with its opinion. Id.

The District Court here also relied upon Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed on other grounds, 451 U.S. 454 (1981), in concluding that the Commonwealth violated Gray's rights by introducing the Sorrell evidence without giving him a meaningful opportunity to defend against it. In Smith, the United States Court of Appeals for the Fifth Circuit affirmed the federal district court's issuance of a writ of habeas corpus based in part upon the state's failure to give trial counsel sufficient time to prepare a defense to certain penalty phase evidence.

Specifically, the State of Texas was permitted to present the testimony of a psychiatrist concerning his opinion of a capital murder defendant's future dangerousness, even though defense counsel did not know that the psychiatrist had examined their client concerning future dangerousness, and even though the psychiatrist's name did not appear on the witness list tendered to the defense prior to trial. The Fifth Circuit relied on Gardner to hold that the state violated the defendant's constitutional rights in the way it introduced the psychiatrist's testimony:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for [defense] counsel to challenge the accuracy or materiality of" evidence, Gardner v. Florida, 430 U.S. at 357, and in foreclosing "that debate between adversaries [which] is often essential to the truth-seeking function of trials," Id. at 360. Smith's attorneys were manifestly surprised by Dr. Grigson's testimony. ... The consequences of this surprise were devastating. Thus the trial judge's informality

> and the prosecution's tactics combined to give Smith's attorneys no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any significant way. Surprise in this case impaired "the interest in reliability," Id. at 359, as much as secrecy did in Gardner. Indeed, the sentencing judge in Gardner relied upon a presentence report, prepared by the Florida Parole and Probation Commission ... under conditions that presumably gave some assurance that the reported information would be accurate. Here we deal with testimony offered by one party and not effectively cross-examined by the other; it carries no assurance of reliability whatever.

Smith, 602 F.2d at 699-701 (emphasis added).

More recently the Fifth Circuit held that a federal district court erred in failing to order an evidentiary hearing on a petitioner's claim that he was unfairly surprised by the manner in which the state introduced evidence at the penalty phase of his capital murder trial intended to show that he was involved in an unrelated, unadjudicated double homicide. In Blackmon v. Scott, 22 F.3d 560 (5th Cir.) cert. denied, 115 S. Ct. 671 (1994), the capital murder defendant and his lawyers learned, four days into the guilt phase of his trial, that the Texas prosecutor intended to use, during the penalty phase, evidence of an uncharged Oklahoma double homicide. In his federal habeas proceedings, the petitioner asserted that his death sentence was unconstitutional because the prosecution secreted from him the witnesses who were to testify against him, thus denying him the opportunity to investigate and prepare a defense to the charges against him. This claim was dismissed by the federal district court.

On appeal, the Fifth Circuit remanded Blackmon's case for an evidentiary hearing on this claim. Relying upon this Court's decision in Gardner, the Circuit Court explained that "a state violates a capital defendant's right to due process when it uses evidence at the sentencing phase of the trial which the defendant does not have a meaningful opportunity to rebut." 22 F.3d at 566. Consequently, remand was required to determine "what Blackmon's counsel might have done differently had more time been given to prepare." Id. The Fifth Circuit did not analyze Blackmon's claim under Teague, most likely because it was obvious that he did not seek to create a new rule, but instead sought only to apply general principles of due process to the facts of his case.

In Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 115 S. Ct. 915 (1995), the

petitioner relied upon Gardner in seeking habeas relief on a claim that his right to confrontation was violated because the trial judge considered hearsay and other improper evidence in making his sentencing determination. The Ninth Circuit held that the petitioner, whose conviction became final in 1984, did not seek a new rule because "[t]he due process requirement that a defendant be advised of all materials to be used against him in sentencing was announced in Gardner v. Florida, 430 U.S. 349 (1977)." 20 F.3d at 953. Consequently, the Ninth Circuit addressed the merits of the petitioner's claim, but rejected it because he had failed to prove that the trial judge considered improper matters in making his sentencing decision. Id. at 957.

The Fourth Circuit has endorsed the holding in Paradis. In a section of Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), explaining that application of a general rule designed for the specific purpose of evaluating a myriad of factual contexts rarely will result in a "new rule," the Fourth Circuit cited Paradis with approval, referring specifically both to its holding that a Jackson v. Virginia challenge is not barred by Teague, and its holding that Teague does not bar application of Gardner's due process principles. 35 F.3d at 885 n.11. Less than one year after the Turner decision, however, the Fourth Circuit decided Gray's case, and held that application of Gardner's principles to his case was barred by Teague. With respect to its decision in Turner, the Fourth Circuit merely stated in a footnote that "[t]his is not a case in which we are asked merely to 'apply an extant normative rule to a new set of facts,' Turner v. Williams, 35 F.3d 872, 885 (4th Cir. 1994), as the rule in Gardner does not apply even generally to this case." Gray, 58 F.3d at 64 n.2. Examination of the District Court and Court of Appeals opinions below, however, demonstrates that Gardner does apply to Gray's case, that the District Court did not create a new rule when it granted relief, and that the Fourth Circuit's attempts to distinguish Gray's case from Gardner are unavailing.

C. This Court's Holding In Gardner v. Florida Controlled And Dictated The District Court's Decision, And The Fourth Circuit's Holding To The Contrary Conflicts With *Gardner*, Other Decisions of This Court, And Decisions Of Other Circuits.

At the beginning of the federal evidentiary hearing, the District Court described the kind of evidence that, if produced by Gray, would lead it to conclude that his due process rights had been violated by the Commonwealth:

> If in fact I were to determine that the Commonwealth had information indicating that somebody else committed these murders, did not inform the defense of that, they never had an opportunity to challenge the information, it went forward, as far as I am concerned, that sentencing hearing would have been constitutionally inadequate. ... I just can't image a circumstance less fair. I mean, this is a person fighting for their life, and you have information that indicates that somebody else might have committed the murder, and you have information that Mr. Gray might have committed the murder, fine. If you tell the defense lawyers about it and let it be hashed out and the jury believes that Mr. Gray committed it, fine. I would have no problem with that. But the circumstances that I have -- and I don't know that this is the situation, obviously. But I am just telling you, that to me would just be terribly unfair, constitutionally unfair.

(A. 266-7) (emphasis added).

In its memorandum opinion granting relief, the District Court made findings that 1) the trial court refused to appoint an investigator to help Gray's attorneys prepare a defense, 2) the prosecutor turned over none of the evidence tending to prove that Timothy Sorrell killed his wife and daughter, even though the trial court ordered him to disclose his exculpatory evidence, 3) at the beginning of the trial, the prosecutor made an unequivocal promise to introduce only statements Coleman Gray allegedly had made about other crimes he committed, but 4) trial counsel learned only on the eve of the sentencing hearing that the prosecutor intended to break his promise and instead present to the jury the testimony of the investigating officer in the Sorrell case, to describe the Sorrell murder scene and display graphic photos of the victims, and the testimony of the medical examiner to describe the causes of death and the nature and extent of the Sorrell's injuries and to display autopsy photographs. Simply stated, the District Court found that "Coleman Gray and his attorneys were ambushed," and that "[t]he consequences of this surprise could not have been more devastating." (A. 948).

Given adequate notice or, at the very least, an honest response to their Brady motion, Gray's defense counsel could have challenged the truth of his accomplice's testimony that he committed the Sorrell murders through effective cross-examination of Detective Slezak. Specifically, defense counsel

could have made at least the following points during Slezak's testimony: 1) Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time, 2) the police designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed, 3) Timothy Sorrell admitted being at the Greenbriar Mall on the evening of the murders, 4) when Timothy Sorrell ran into his wife's parents at the mall, he ignored them, 5) Timothy Sorrell made suspicious comments after he was notified by the police that his wife and child had been found, 6) Timothy Sorrell changed his alibi throughout the murder investigation, 7) Timothy Sorrell had a strong motive to commit these murders -- just two weeks prior to the brutal slayings, he became the beneficiary of an insurance policy written on his wife's life, 8) six days before Coleman Gray's trial, Lisa Sorrell's parents filed a lawsuit seeking to prohibit Timothy Sorrell from collecting the proceeds of the life insurance policy, 9) Timothy Sorrell visited a friend on the night his wife and child disappeared. That evening, five days before their bodies were found, Sorrell allegedly told his friend that his wife and baby were dead, 10) Coleman Gray had an alibi, because Detective Slezak knew that Gray was with his wife the evening of the Sorrell murders, and that there was not sufficient time for the murders to have been committed during Gray's wife's dinner break as previously had been speculated by Slezak, 11) even when Detective Slezak lied to Coleman Gray and told him that his fingerprint had been found at the murder scene, Gray steadfastly maintained his innocence, 12) Detective Slezak had consulted with the Chesapeake Commonwealth's Attorney to determine whether it was appropriate to prosecute Timothy Sorrell.

This list is derived from the federal district court's findings of fact.

The very essence of this case is that, because of the prosecutor's tactics of secrecy and surprise, Gray was not given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. See Gardner, 430 U.S. at 356; Smith v. Estelle, 602 F.2d at 699-701. Gray probably was innocent of the Sorrell murders, but the prosecutor presented him to the jury as probably guilty. As a consequence of the prosecutor's deceitful tactics, Gray was sentenced to death based largely

upon unreliable evidence which he had no opportunity to explain or deny. Gardner, 430 U.S. at 362. Given the plain applicability of these principles to the facts of this case, it is unremarkable that the District Court relied in part upon Gardner to support its decision.

Indeed, Gardner did not create these principles out of whole cloth -- these are principles of due process that lie at the core of this Court's jurisprudence. The District Court understood this, citing In re Oliver, 333 U.S. 257, 273 (1948) and Baldwin v. Hale, 68 U.S. 223, 233 (1863), along with Gardner, for the proposition that the Due Process Clause does not allow the execution of a person on the basis of information which he has no opportunity to explain or deny. In Baldwin, this Court broke no new ground in holding that "[c]ommon justice requires that no man shall be condemned in his personal property without notice and an opportunity to make his defense." 68 U.S. at 233 (citing Nations v. Johnston, 24 How. 203; Boswell v. Otis, 9 How. 350; Oakley v. Aspinwall, 4 N.Y. 514). In Oliver, this Court held that:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of justice; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

333 U.S. at 273.

It is not hyperbole to compare Gray's case with Powell v. Alabama, 287 U.S. 45 (1932). The nine young, illiterate, black defendants in Powell had been charged with a notorious capital crime -- the rape of two white girls on a train outside of Scottsboro, Alabama. The crime allegedly was committed on March 25, 1931, and an indictment was returned on March 31. On that same day, the defendants were arraigned and entered pleas of not guilty. At arraignment, the trial judge "appointed all the members of the bar for the purpose of arraigning the defendants and then ... anticipated that the members of the bar would continue to help the defendants if no counsel appeared." 287 U.S. at 49. The defendants never were asked whether they or their families wished to retain counsel, or whether they wished to have counsel appointed. Id. at 52.

On April 6, six days after indictment, the trials began. The trial court inquired whether the parties were ready for trial, and the state's attorney replied that he was ready. No one answered for the defendants or appeared to represent them. A trial lawyer from Tennessee, however, who was not a member of the local bar, told the court that he had not been employed to represent the defendants, but that people who were interested in their cases had spoken to him about the case. He told the court that he would like to appear along with counsel that the court might appoint to represent the defendants. Id. at 53. The trial court allowed this lawyer to represent the defendants with the assistance of other members of the bar, "[a]nd in this casual fashion the matter of counsel in a capital case was disposed of." 287 U.S. at 56.

This Court explained that it was not enough to assume that counsel thus precipitated into the defendants' cases thought there was no defense, and exercised their best judgment in deciding to proceed to trial without preparation. "Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial." Id. at 58. (emphasis added). In holding that the defendants' due process rights had been violated, this Court explained that:

> It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard." And Mr. Justice Field, in an earlier case, Galpin v. Page, 18 Wall. 350, 368, 369, 21 L. Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

287 U.S. at 68.

Coleman Gray never was indicted for the Sorrell murders, and he learned just three days before the penalty phase of his capital murder trial that the prosecutor intended to introduce a statement he allegedly made that he was involved in the crimes. Then, on the eve of the penalty phase, his counsel learned for the first time that the prosecutor intended to present, in essence, a full-blown trial of the Sorrell murders, including graphic photographic evidence and testimony of the lead detective and the medical examiner. This "notice" was calculated carefully by the prosecutor to deprive Gray of the opportunity to defend himself against the charge that he murdered Lisa and Shanta Sorrell. As a consequence, he was sentenced to death on the basis of information which he had no opportunity to explain or deny, not only in violation of Gardner, but also in contravention of immutable principles of justice, long recognized by this Court, which inhere in the very idea of a free government.

D. The Fourth Circuit's Holding That The District Court Impermissibly Created A New Rule Conflicts With Teague And Its Progeny, With The Ninth Circuit's Decision In Paradis, And With Prior Fourth Circuit Decisions. Moreover, The Fourth Circuit's Holding That Gardner Does Not Control This Case Conflicts With Decisions Of This Court And The Fifth Circuit's Decisions In Estelle and Blackmon.

It is elementary that this Court's Gardner decision and the basic principles of due process upon which it relies must provide the framework within which Gray's claim is to be analyzed. The death penalty states have taken different positions concerning the use of prior unadjudicated conduct in the capital sentencing phase. Of the twenty-four states that have decided the issue, sixteen have held that evidence of unadjudicated offenses is admissible in the capital sentencing phase. Ten of these states have held that, while admissible, the introduction of prior unadjudicated conduct must be accompanied by procedural protections such as a heightened standard of reliability or a limiting instruction regarding the proper use of such evidence. Eight states simply prohibit the use of this kind of evidence. Virginia is one of only six states placing virtually no restrictions upon the introduction of prior unadjudicated conduct. See Steven P. Smith, *Unreliable And Prejudicial: The Use Of Extraneous Unadjudicated Offenses In The Penalty Phases Of Capital Trials*, 93 COLUM. L. REV. 1249, 1267-68 (1993). Given

Virginia's decision to take no prophylactic measures to ensure procedural fairness at the capital sentencing phase, it goes without saying that the Due Process Clause in general, and Gardner and its predecessors in particular, will have more to say about the procedural fairness of a Virginia sentence based upon prior unadjudicated conduct than otherwise might be the case.[4]

Despite this, the Fourth Circuit reached the conclusion that Gardner and the due process principles described therein "do[] not apply even generally to this case." 58 F.3d at 64 n.2. The Circuit Court accomplished this first by defining the rule sought by Gray, in minimalist fashion, as "a constitutional entitlement to adequate advance notice of particular items of evidence." 58 F.3d at 64. (emphasis in original). This rule neither was advanced by Gray nor created by the District Court. By reducing the rule for purposes of Teague analysis to the narrowest possible holding that the District Court might have reached (but in fact did not), the Fourth Circuit ignored the "new rule" jurisprudence of this Court, and its own prior decisions explaining that the rule sought by a petitioner, for Teague purposes, rarely is the most specific conclusion or holding possible. The rest of the Circuit Court's opinion is devoted to explaining why this narrow rule is not dictated by principles of due process. An examination of the Fourth Circuit's opinion demonstrates, however, that the cases and principles upon which it relies are no part of the framework within which Gray's claim must be considered.

First, the Fourth Circuit concluded that Gardner does not apply because it "does not dictate the conclusion that petitioner had a constitutional right to some minimum amount of advance notice of the particulars of the prosecution's penalty case." 58 F.3d at 64. The Court then suggested that this Court's holding in Gardner is limited only to situations in which the defendant was sentenced on the basis of

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[4]It is interesting, and perhaps telling, to note that, at least in theory, what happened at Gray's sentencing hearing no longer should occur in Virginia. While Virginia continues to place no restrictions upon the use of prior unadjudicated conduct, upon defendant's motion the Commonwealth now must provide written notice of an intention to present this kind of evidence. Va. Code § 19.2-264.3:2. The notice must describe the conduct to be proved, and must include the time and place such conduct will be alleged to have occurred, if that information is available. It is left to the trial court to specify the time by which this notice must be given. Id.

"secret" information:

> [Here], the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was specifically afforded the chance to cross-examine the adverse witnesses. See Williams v. New York, 337 U.S. 241 (1949) (no due process violation where judge discussed sentencing evidence in open court, even though some of the evidence was not previously disclosed to the defense). ... If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded.

Gray, 58 F.3d at 64.

The Fourth Circuit's reliance upon this Court's decision in Williams as precedent dictating the reversal of the District Court's decision is troubling. As is explained earlier, in Gardner this Court -- if it did not implicitly overrule the holding in Williams as it relates to capital cases -- at least severely limited its application, because it was decided before the Court recognized a significant constitutional difference between the death penalty and lesser punishments, and because it was decided before it was "clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 357-58.

It also is troubling that the Fourth Circuit represents that defense counsel made no motion for a continuance. As soon as the prosecutor revealed his intent to present the Sorrell evidence at the start of the penalty trial, defense counsel promptly and repeatedly informed the court that they needed more time. (A. 2063-68, 2118-23). The district court made an express factual finding that counsel made a satisfactory request for a continuance. (A. 941). The Fourth Circuit, however, in contravention of this Court's holding in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), ignored this factual finding and concluded that Gray's counsel did not ask for a continuance.

Perhaps most troubling of all is the Fourth Circuit's conclusion that, because Gray took the stand and addressed the jury after presentation of the Sorrell evidence, he was given a fair opportunity to defend himself. According to the Fourth Circuit, Gray therefore "had an opportunity to explain or deny the evidence. This case is thus distinguishable from Gardner on first principles." Gray, 58 F.3d at 64.

(emphasis in original). This may be the first case in which a court has suggested that a defendant's right to take the stand, without more, is a substitute for adequate notice and an opportunity to prepare a defense to the prosecution's case against him. See Powell, 287 U.S. at 68 ("It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they ... constitute basic elements of the constitutional requirement of due process of law").

Next, the Fourth Circuit states that "Gardner itself warned against broad expansions of its holding." Gray, 58 F.3d at 64. For this proposition, the Circuit Court cites a footnote in Gardner which explains that the fact that principles of due process apply at the sentencing phase of a capital murder trial does not implicate the entire panoply of criminal trial procedural rights. Gardner, 430 U.S. at 358 n.9. According to the Fourth Circuit, because due process generally does not require that advance discovery of witness statements be given to criminal defendants, and because:

> [t]his practice has, to our knowledge, never been found to offend the Due Process Clause[, therefore,] [i]n light of the fact that Gardner expressly avoided importing even established trial rights into sentencing, it is implausible that it created sentencing rights that are nonexistent at trial. In sum, Gardner did not clearly forbid the jury from sentencing petitioner on the basis of the Sorrell evidence.

58 F.3d at 65.

The Fourth Circuit was able to reach this conclusion only by taking Gardner's footnote nine completely out of context. The remainder of the footnote, which is ignored by the Fourth Circuit, quotes as follows from this Court's decision in Morrissey v. Brewer, 408 U.S. 471, 481 (1972):

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. ... Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Gardner, 430 U.S. at 358 n.9. (emphasis added). The Fourth Circuit's opinion to the contrary, Gardner does not warn against broad expansions of its holding. Instead, it teaches that the principles of due

process it relies upon are flexible and must be applied on a case-by-case basis. In other words, application of Gardner's principles to a new set of facts rarely will result in a "new rule."

Indeed, in 1991, the author of the majority opinion in this case authored an opinion in a non-capital case in which he relied upon Gardner as authority for vacating a sentence. In United States v. Bakker, 925 F.2d 728 (4th Cir. 1991), the defendant was convicted in federal district court on charges of mail fraud, wire fraud, and conspiracy arising out of his activities as a television evangelist. On appeal to the Fourth Circuit, Bakker argued that his sentence was unconstitutional because the trial judge violated due process by factoring his own sense of religiosity and victimization into the sentence he imposed on him. Specifically, during sentencing, the judge stated that Bakker:

> [h]ad no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.

925 F.2d at 740 (emphasis in original).

The Fourth Circuit held that the trial court abused its discretion in sentencing Bakker, and, implicitly, that his sentence was unconstitutional. The Circuit Court relied in part upon Gardner in reaching this conclusion. Id. Surely, if Gardner's principles of due process applied in Bakker, they apply with greater force and effect under the circumstances presented in this case.

Next, the Fourth Circuit held that it was error for the District Court to rely upon the Fifth Circuit's decision in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed on other grounds, 451 U.S. 454 (1981). Specifically, the District Court relied upon the portion of Smith explaining that "surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that 'debate between adversaries [which] often is essential to the true-seeking functions of trials.'" 602 F.2d at 699 (citations omitted). The Fourth Circuit criticized the District Court's reliance on Smith as follows:

> The Estelle decision was based on Gardner. Estelle, however, is a habeas case that was decided before the Supreme Court limited the formulation of new rules on collateral review. Extending the holding of Gardner, which involved a complete failure to disclose, to a case in which disclosure was made but allegedly so late as to be unfair, requires the analytical equation of "secrecy" and "surprise." While the Estelle court may have been free to make that leap in extending Gardner, such analysis is no longer permissible on collateral review.

Gray, 58 F.3d at 65 (citations omitted). That the Fourth Circuit believes the Fifth Circuit's decision in Smith now would be barred by the new rule doctrine demonstrates its excessively narrow view of Teague. Both Gardner and Smith involved state action which deprived a capital defendant of the opportunity to deny or explain the information upon which he was sentenced to death. The distinction drawn by the Fourth Circuit between the secrecy in Gardner and surprise in Estelle is without constitutional significance. Moreover, the Fourth Circuit ignores that this case involves both surprise and secrecy -- not only was Gray deprived of fair notice, but he also was deprived of the evidence demonstrating that Timothy Sorrell may have committed these murders.

Finally, the Fourth Circuit states that Gray's "contention rings hollow on its facts, because he "has advanced no meaningful way in which he would have proceeded any differently at the penalty phase" given sufficient notice. Gray, 58 F.3d at 66. The Fourth Circuit is able to make this statement only by ignoring the substantial evidence held by the Commonwealth concerning Timothy Sorrell, by relegating him to a footnote in the opinion, by describing him as "an initial suspect," and by "refus[ing] to be dragged into a mini-trial on the respective strengths of the cases against Sorrell and petitioner." Id. at 66 n.3. Thus, the Fourth Circuit avoids the thorniest issue of fact in this case -- that there was substantial evidence tending to prove that Timothy Sorrell committed these murders, and practically no evidence linking Gray to the crime. Even without an honest and complete response to his Brady motion, given adequate notice Gray likely could have uncovered much of the evidence against Timothy Sorrell, and could have used it to defend himself against the charge that he committed these terrible crimes. Indeed, it seems doubtful that the prosecutor would have presented this evidence knowing that it could be defended so effectively. Gray's due process rights were violated by the prosecutor, and the Fourth Circuit was able to conclude to the contrary only because of its excessively narrow view of the facts, as

well as the controlling law. The end result of its narrow logic is a decision which conflicts with controlling opinions of this Court, with the Fifth Circuit's opinions in Smith and Blackmon, and with the Ninth Circuit's opinion in Paradis that Gardner claims typically are not barred by Teague.

The Fourth Circuit's confusion perhaps can be traced to its misunderstandings concerning the Teague doctrine and the District Court decision. The Fourth Circuit's opinion reflects a belief that the new rule doctrine requires federal courts to treat to state court decisions concerning "state practices of criminal procedure ... with substantial deference." Gray, 58 F.3d at 66. In this Court's decision in Wright v. West, 112 S. Ct. 2482 (1992), Justice O'Connor, in her concurring opinion, explained that the Teague doctrine is not a rule of deference:

> Teague did not establish a "deferential" standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, Teague simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. Penry, supra, 492 U.S. at 314; Teague, supra, 489 U.S. at 301. In Teague, we refused to give state prisoners the retroactive benefit of new rules of law, but we did not create any deferential standard of review with regard to old rules.

Wright, 112 S. Ct at 2497. Justice O'Connor explained further that the Teague doctrine does not permit federal courts to abdicate the duty to review independently a state conviction, and instead defer to "reasonable," though wrongly decided, state court decisions, because "[w]e have always held that federal courts, even on habeas, have an independent obligation to say what the law is." Id.

In this case, the District Court simply fulfilled its independent obligation to say what the law is, and held that the Commonwealth's tactics of secrecy and surprise violated basic principles of due process, espoused in Gardner and other decisions of this Court. Contrary to the Fourth Circuit's conclusions, the District Court's decision imposed no new obligations on the Commonwealth of Virginia. The Commonwealth already was bound by Gardner to ensure that Gray was given a fair opportunity to defend himself against the charge that he murdered the Sorrells. The District Court did not require that, in the future, Virginia capital defendants receive any kind of discovery whatsoever. Rather, the District Court simply held that, under the circumstances involved in this case, Gray was sentenced to death without due

process of law.

The Fourth Circuit was able to reverse the District Court only through gross misapplications of this Court's "new rule" doctrine and of Gardner's holding. The decision below is thus in conflict with the decisions of this Court, the Ninth Circuit, and the Fifth Circuit. If this decision is allowed to stand, it will stand as precedent allowing, if not commanding, federal courts to refuse to reach the merits of most constitutional claims raised by federal habeas petitioners, and instead to defer at all costs to state court decisions. This is not the intent of Teague and its progeny, and this Court should grant certiorari to review the Fourth Circuit's decision.

II. THE FOURTH CIRCUIT'S HOLDING, WHICH ALLOWS A PROSECUTOR TO WITHHOLD FROM A CAPITAL DEFENDANT EVIDENCE TENDING TO PROVE THAT ANOTHER PERSON COMMITTED THE NOTORIOUS DOUBLE HOMICIDE UPON WHICH THE STATE RELIED TO PROVE AT SENTENCING THAT THE DEFENDANT POSED A FUTURE DANGER TO SOCIETY, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN BRADY V. MARYLAND AND ITS PROGENY, INCLUDING *KYLES V. WHITLEY*.

Certiorari on this question should be granted because the Opinion below conflicts with this Court's landmark decision in Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, including the Court's recent decision in Kyles v. Whitley, 115 S. Ct. 1555 (1995). Kyles was decided after this case was briefed in the Fourth Circuit on the merits, but before oral argument. At oral argument, counsel for Gray informed the Circuit Court of the Kyles opinion, and described its applicability to this case. Gray also relied upon Kyles in his Petition for Rehearing and Suggestion for Rehearing En Banc to the Fourth Circuit. Nevertheless, the Fourth Circuit failed to consider whether Gray was entitled to relief under Kyles.

The District Court made findings of fact that Gray's counsel made a request to the prosecutor for the disclosure of exculpatory evidence, but that the prosecutor failed to disclose a substantial amount of exculpatory evidence tending to prove that Timothy Sorrell murdered his wife and child, and that Gray was not involved in the crimes. This evidence has been described in detail earlier in this Petition.

During the District Court evidentiary hearing, the prosecutor maintained that, to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray," testimony found by the District Court to be "patently absurd." (A. 943).

Detective Slezak's knowledge of the evidence concerning Timothy Sorrell "would have fueled a withering cross-examination, destroying confidence in [Tucker's] story [that Gray confessed to the crimes] and raising a substantial implication that the prosecutor had coached [Slezak] to [avoid discussion of Timothy Sorrell]. 115 S. Ct. at 1570. This cross-examination also would have demonstrated the possibilities 1) "that the lead police detective who testified was either less than wholly candid or less than fully informed," Kyles, 115 S. Ct. at 1575, 2) "that the investigation was limited by the [prosecution's] uncritical readiness to accept the story and suggestions of an informant [Tucker]," id. and 3) that the prosecution, police, and Tucker "set up" Gray, id. at 1573. It would have demonstrated the complete lack of "thoroughness and even [of] good faith of the investigation." Id. at 1571. It also would have shown that Gray had an alibi. (A. 943). In sum, it would have completely undermined the prosecution's penalty phase case, and it therefore must "undermine[] [our] confidence in the outcome of the trial." Kyles, 115 S. Ct. at 1566 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). In other words, the exculpatory evidence withheld by the prosecutor was material, and the Fourth Circuit should have affirmed the District Court's grant of the writ of habeas corpus, based on Brady and Kyles.

Ironically, during penalty phase closing arguments the prosecutor asked the jury whether Gray "s[a]t in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?" (A. 2263). In fact, it is the prosecutor who chose to try Gray for the Sorrell murders without charges and without due process of law.

Nevertheless, the Fourth Circuit avoided the Kyles issue in this case by cavalierly ignoring the significance of the evidence tending to show that Timothy Sorrell killed his wife and daughter. Sorrell was the Commonwealth's sole suspect for many months, and remained the Commonwealth's primary

suspect right up until the time of Gray's trial. Yet, the Fourth Circuit refers to him only as an "initial suspect," and "refus[es] to be dragged into a mini-trial on the respective strengths of the case against Sorrell and petitioner." Gray, 58 F.3d at 66. The Fourth Circuit's Opinion is in direct conflict with this Court's decisions in Brady and Kyles, and if it is allowed to stand as precedent it will allow "the adversary system of prosecution [in Virginia] to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." Kyles, 115 S. Ct. at 1568. This Court should grant certiorari to review the Fourth Circuit's decision.

III. THE FOURTH CIRCUIT'S HOLDING THAT VIRGINIA'S LIMITING CONSTRUCTIONS CONSTITUTIONALLY ARE SUFFICIENT TO CURE THE FACIAL VAGUENESS OF THE "VILENESS" AGGRAVATOR IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Certiorari should be granted on this question because the Court of Appeals' affirmance of Virginia's limiting constructions for the "depravity of mind" and "aggravated battery" components of the "vileness" aggravating circumstance is contrary to this Court's decisions in Godfrey v. Georgia, 446 U.S. 420 (1980), and subsequent cases. Specifically, these limiting constructions fail to narrow to a subclass the defendants convicted of murder who may be sentenced to death, because these limiting constructions virtually apply to the facts surrounding any murder.

In Godfrey, this Court held that a vileness aggravating factor identical to the one used in Virginia was unconstitutionally vague and overbroad on its face absent clarifying and narrowing jury instructions and appellate review to restrict imposition of the death penalty to crimes lying at the core of the vileness factor, and not at its periphery. More recently, the Court has explained that the Eighth and Fourteenth Amendments require statutory aggravating factors to meet two standards to justify a death sentence. First, "the aggravating circumstance may not be unconstitutionally vague" -- that is, it must have a "'common-sense core of meaning ... that criminal juries should be capable of understanding.'" Tuilaepa v. California, 114 S. Ct. 2630, 2635-36 (1994) citing Godfrey, 446 U.S. at 428, and Arave v. Creech, 113 S. Ct. 1534, 1541 (1993), and quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J.,

concurring). Second, "the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Tuileapa, 114 S. Ct. at 2635 (citing Arave, 113 S. Ct. at 1542). Moreover, a statutory aggravating circumstance that is too vague as stated can be used only if the jury is given a tightly drawn definition instruction, or if the state appellate court reviews the particular finding with a consistent and narrow appellate construction. See e.g., Walton v. Arizona, 497 U.S. 639, 653 (1990) ("when a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutional on its face.").

In an opinion proceeding Godfrey, the Virginia Supreme Court developed limiting constructions for the terms "depravity of mind" and "aggravated battery" used in Virginia's "vileness" aggravator. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978); Va. Code § 19.2-264.2. The Court did this because it, like this Court in Godfrey, recognized that "any act of murder arguably involves 'depravity of mind' and an 'aggravated battery to the victim,' [and] it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance." Id. The Court responded to this problem by defining depravity of mind to mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Id. Aggravated battery was defined "to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Id. According to the Virginia Supreme Court, "these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, 'outrageously or wantonly vile, horrible or inhuman'." Id.

In this case, the trial court instructed the jury that the Commonwealth must prove the "vileness" aggravator beyond a reasonable doubt. (A. 2234). The court then gave the jury limiting instructions

mimicking Smith's depravity of mind and aggravated battery constructions (although the court mistakenly instructed the jury about "physical" debasement instead of "psychical" debasement).[5] The trial court did not define "moral turpitude," "psychical," "debasement," "ordinary legal malice," or "premeditation." Nor did the court explain what degree of moral turpitude and psychical basement are inherent in the definition of ordinary legal malice and premeditation. After deliberating for one hour and ten minutes, the jury returned a verdict finding beyond a reasonable doubt that Gray's conduct satisfied the "vileness" aggravator. The Fourth Circuit held that these limiting instructions meet the constitutional standards set forth in Godfrey. They do not.

The trial court's definition of "depravity of mind" did nothing to channel the jury's discretion in this case. Even an experienced jurist would have difficulty making sense of and taking direction from "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Even with further definitions of "malice" and "premeditation," (which were not given here) these instruction do not meet the United States Supreme Court's requirement that aggravating factors have a common-sense core of meaning that criminal juries should be capable of understanding. Tuilaepa, 114 S. Ct. at 2635-36. "Moral turpitude" at best is only an alternative formulation of "baseness," "depravity," or "vileness," words that the Court has rejected as a constitutional basis for imposing the death penalty. See Godrey, 446 U.S. at 428-29. "Psychical debasement" has no apparent meaning at all and could refer to corruption from supernatural, spiritual, mental, moral, emotional, intuitive or any of several other influences.

Simply stated, this "limiting" instruction presupposes that a jury of lay-people know what "ordinary legal malice and premeditation" are, requires that they determine how much "moral turpitude"

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[5]This mistake alone made the depravity of mind limiting instruction unconstitutionally vague. The depravity of mind standard obviously is intended to focus the jury on the defendant's state of mind, but this mistake focused the jury on the victim's injuries. A jury reasonably could decide that any murder involves physical debasement of the victim.

and "psychical debasement" are "inherent" in ordinary legal malice and premeditation, and then determine whether the particular offense "surpasses" this ordinary level of debasement and turpitude. This instruction simply provided no guidance to the Gray jury. See Deutscher v. Whitley, 884 F.2d 1152, 1162 n.1 (9th Cir. 1989), vacated and remanded, 500 U.S. 901 (1991), on remand, 946 F.2d 1443, 1446-47 (9th Cir. 1991), vacated and remanded, 113 S. Ct. 367 (1992), on remand, 16 F.3d 981 (9th Cir. 1994) (rejecting as unconstitutionally vague a "depravity of mind" limiting instruction describing the term as "characterized by an inherent deficiency of moral sense and rectitude, and consisting of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life").

Similarly, the limiting instruction for the aggravated battery circumstance is unconstitutional because it reasonably can apply to every murder, and does not truly limit the class of murders for which the death penalty may be imposed. To determine that an aggravated battery is "qualitatively or quantitatively more culpable than the minimum necessary to accomplish an act of murder" requires an articulable sense of the "minimum necessary." For any murder, jurors could and would imagine a situation less culpable than the one before them. A murder by one knife wound may seem excessively gory compared to a murder accomplished with a well-placed bullet, or the opposite may be true, depending on one's preferences. Both murders could exceed a jury's sense of the "necessary" minimum.

Indeed, with its overbroad definitions of "depravity of mind" and "aggravated battery" the Virginia Supreme Court has created as a standard a hypothetical murder in which a theoretical criminal uses just enough force to commit a murder and acts with the absolute minimum of malice and premeditation. Rather than creating a specific and well-defined class of murders for which the death penalty is appropriate, they simply create a singular fictional murder for which capital punishment may not be imposed and allow the death penalty in all other cases where the theoretical minimum is exceeded. This is not guidance. It is the unbridled discretion forbidden by every holding of the this Court since

Furman v. Georgia, 408 U.S. 238 (1972). The failure of the trial court to provide sufficiently narrow limiting instructions to constrain the jury's discretion to impose the death sentence based on a finding of "vileness" warrants a grant of certiorari.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully Submitted,

COLEMAN WAYNE GRAY

By: Paul G. Turner

Paul G. Turner
Counsel of Record
3110 Sunset Avenue
Richmond, VA 23221
(804) 353-7443

Mark E. Olive
Donald R. Lee, Jr.
Virginia Capital Representation Resource Center
The Heritage Building
1001 East Main Street
Richmond, VA 23219
804/643-6851